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BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments of DIRECTV, Inc. to Further NPRM, IB Docket 95-59

Dear Mr. Caton:

Enclosed please find an original and four copies of the Comments of DIRECTV, Inc. to the Further NPRM in IB Docket 95-59. Please note that the Declaration of Lawrence N. Chapman, DIRECTV's Senior Vice President of Special Markets and Distribution, submitted as Exhibit D to the Comments, is unsigned. While Mr. Chapman consented to the form and substance of the Declaration, due to logistical difficulties he was unable to provide counsel with a signed copy of the Declaration by the filing deadline. We will supplement this filing with a signed version of Mr. Chapman's Declaration as soon as practicable.

No. of Copies rec'd 0+4
List A B C D E

If you have any questions regarding this matter, please do not hesitate to call me at (202) 637-2184.

Sincerely,

Steven H. Schulman
of LATHAM & WATKINS

Enclosure
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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	IB Docket No. 95-59
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket 96-83
	)	
Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

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COMMENTS OF DIRECTV, INC. TO FURTHER NPRM

DIRECTV, Inc.

James F. Rogers
Steven H. Schulman
LATHAM & WATKINS
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Washington, DC 20004
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September 27, 1996

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COMMENTS OF DIRECTV, INC. TO FURTHER NPRM

I. INTRODUCTION AND SUMMARY

In Section 207 of the Telecommunications Act of 1996, Congress gave the Commission a broad mandate: "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception." In response, the Commission adopted Section 1.4000 of its rules, 47 C.F.R. § 1.4000, preempting local governmental restrictions and invalidating homeowners association rules and other restrictive covenants that impair the use of over-the-air reception devices, including broadcast antennas and direct broadcast satellite ("DBS") dishes.[1]

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[1] *See Preemption of Local Zoning Regulation of Satellite Earth Stations,* IB Docket 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service,* CS Docket 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 96-328 (August 6, 1996) (the *"Order"*).

However, in an effort to meet the Congressionally-imposed deadline of August 8, the Commission did not complete implementation of this directive. Besieged by unanticipated comments from the National Apartment Association ("NAA") and other residential landlord groups claiming that allowing renters to install antennas would constitute a taking under the Fifth Amendment, the Commission fashioned a regulation that protects only those viewers with a direct or indirect ownership interest in *and* exclusive use of the area where they seek to install the antenna. While there may be some practical basis for differentiating between viewers with and without exclusive use areas, there is absolutely no statutory, legal or policy reason to limit the protections of Section 207 to property owners. DIRECTV, Inc., the nation's leading provider of DBS services, urges the Commission to include all viewers, regardless of ownership status, within the protections of its new rule.[2]

Congress enacted Section 207 to provide all viewers with the ability to access antenna-delivered video programming and to promote competition to cable television. Congress in no way distinguished between viewers based on land ownership status, nor did it intend the Commission to promulgate a regulation that deprives nearly half the viewers in America of the benefits of Section 207.[3] The Takings Clause of the Fifth Amendment cannot justify this discrimination, either, as a renter cannot be held to "take" property over which he has already been granted exclusive use. The Commission should therefore eliminate land ownership as a prerequisite to the protections of Section 1.4000.

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2 Throughout these comments, DIRECTV will focus its discussion of over-the-air reception devices upon DBS dishes.

3 *See* Infra at Section III. B. Approximately 40% of all housing units in the U.S. are rented -- including apartment units and single family homes.

The Commission cannot fully implement Section 207 until it provides viewers who do not have exclusive use areas, particularly residents of multiple dwelling units ("MDUs"), access to over-the-air reception devices. Again, there is no statutory basis upon which to exclude these viewers from the benefits of Section 207, nor can the rule completely achieve Congress's policy goals if it excludes residents of MDUs, which comprise approximately 26% of all housing units.[4] The Commission can provide access to these viewers without implicating the Takings Clause if it fashions a rule that allows landlords to maintain control over the installation and maintenance of antennas installed in common areas, such as on rooftops. The Commission should therefore amend Section 1.4000 to require landlords, (condominium associations and other homeowners groups) to provide access to at least two multichannel video programming distributor ("MVPD") services to residents who do not have exclusive use of areas suitable for antenna installation.

II. BACKGROUND

When Congress enacted Section 207 as part of the Telecommunications Act in February 1996, the Commission was already in the midst of a rulemaking proceeding to preempt local governmental regulations impairing the use of satellite antennas. As the Commission recognized shortly after the new law was enacted, Section 207 mandated a broader preemption than the Commission had proposed prior to enactment, as Congress required the Commission to prohibit *both* governmental and private restrictions on the installation, maintenance and use of

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[4] MDU residents are a significant market for DIRECTV, which launched its MDU program in August 1996. *See* Exhibit A (Press Release: "DIRECTV, Inc. Launches Program to Serve Multiple-Family Dwelling Unit Market").

DBS antennas.[5] Accordingly, the FCC proposed to prohibit all "non-governmental" restrictions impairing the use of DBS antennas.[6]

In response to the Commission's proposal, commenters representing landlords and other community associations urged the Commission to exclude lease restrictions from the non-governmental restrictions to be prohibited in its new regulation.[7] These commenters argued that to allow renters to install DBS and other antennas on landlord-owned property would implicate the Takings Clause of the Fifth Amendment, citing *Loretto v. Teleprompter Manhattan CATV Corp.*[8] as the applicable precedent. The focus of these comments was the applicability of the proposed rule to residents (primarily renters) of MDUs. NAA, for example, submitted a mock photograph purporting to show DBS antennas installed on every balcony of an apartment building.[9]

In August 1996, the Commission adopted Section 1.4000, prohibiting both governmental and non-governmental restrictions on the installation of antennas only where the viewer possesses (i) a direct or indirect ownership interest in, and (ii) exclusive use of, the property where the antenna is to be installed. Because the Commission had not anticipated how its rule would affect tenant-occupied property, it has now invited comment on whether and how it should extend Section 1.4000 to protect non-landowners and those without exclusive use areas.

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5 *Preemption of Local Zoning Regulation of Satellite Earth Stations,* 11 F.C.C. Rcd. 5809, 5820, ¶ 56 (Report & Order and Further NPRM) (March 11, 1996) (the *"DBS Order"*).

6 *Id.* at ¶ 62 (proposing Section 25.104(f)).

7 *See, e.g.,* Comments of NAA, filed April 15, 1996 in DBS Proceeding, at 13.

8 458 U.S. 419 (1982)

9 Comments of NAA at Exhibit A.

III. THE FCC SHOULD NOT LIMIT SECTION 1.4000 TO LANDOWNERS

Section 207 requires the Commission to prohibit all governmental and private restrictions impairing a viewer's ability to install and use antennas to receive over-the-air programming services, including DBS. The Commission has already prohibited such restrictions found in private agreements such as homeowners association regulations, condominium rules, and restrictive covenants, to the extent they preclude the installation of antennas in "exclusive use" areas.[10] The statutory authority, the policy basis, and the constitutional analysis to extend this rule to prohibit lease restrictions on antenna installations is no different; none of these authorities distinguishes between land owners and renters. The Commission should therefore immediately eliminate the distinction it has made between landowners and renters by amending Section 1.4000(a) to permit every viewer to install antennas in his or her exclusive use area.[11]

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10 "Exclusive use" area is undefined in the *Order*. DIRECTV understands that the Commission intends this area to be one from which the user can generally exclude others, subject to some conditional entries, such as for maintenance or other functions conducted by a landlord, property manager or condominium association.

11 The amendment would be made simply by removing the words "where the user has a direct or indirect ownership interest in the property" from Section 1.4000(a). Community associations and other homeowners groups should not be allowed to prohibit the use of antennas by individual residents with exclusive use areas merely by having the association provide the same programming via a master antenna, as proposed by the Community Associations Institute. *See Order* at ¶ 49. Any viewer, whether an owner or renter, who possesses an exclusive use area should be able to use that area for the installation of one or more antennas of his or her choice. As discussed in greater detail below, only where a viewer has no exclusive use area for an antenna should a landlord or community association be the gateway to MVPD services.

A. Section 207 Requires the Commission to Prohibit Lease Restrictions

Neither the Commission nor any commenter has provided a statutory basis for limiting the benefits of Section 207 to landowners;[12] indeed, there is nothing in either the language or the policies of Section 207 that supports this caste system. The language of Section 207 is broad and sweeping, ordering the Commission to adopt a regulation that prohibits "restrictions" that impair a "viewer's" ability to receive programming delivered via over-the-air reception devices. The Commission has already found that Section 207 mandates the prohibition of both governmental and private restrictions;[13] lease restrictions were not exempted from this statutory requirement. Likewise, Congress intended that all Americans be offered the protections of Section 207, as reflected by the unqualified use of the term "viewer." There is certainly nothing in the language of the statute that would justify a classification of viewers based upon land ownership.

Congress enacted Section 207 to provide increased competition to cable television and promote universal access to over-the-air programming services;[14] the Commission cannot accomplish these policy goals by excluding almost half of all viewers from the protections of Section 1.4000. Renters comprise nearly half the American population, occupying approximately

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12 The Commission asserts that its exclusion of non-landholding viewers from Section 1.4000 "appropriately implements the statute," but cites neither the text nor the legislative history of Section 207 to support its statement. *Order* at ¶ 48.

13 The Commission found that it has been given the authority to prohibit "nongovernmental restrictions that are inconsistent with the federal directive written by Congress in Section 207." *Order* at ¶ 41.

14 NAA's argument that a landlord may prevent a tenant from receiving DBS or another MVPD service as long as it provides cable television completely misses the point behind Section 207. NAA DBS Comments at 13. Section 207 was enacted to promote competition to cable television, not to permit landlords to perpetuate the cable monopoly.

40% of all housing units in the United States in 1993.[15] DBS providers and other MVPDs cannot provide effective competition to cable television if federal law permits them to be excluded from such a large segment of the market.[16]

Perhaps the most pernicious effect of the Commission's exclusion of renters from Section 1.4000 is its disproportionate impact on both minority and lower-income viewers. The evidence is striking. Unlike whites, most minorities are renters -- whereas 68.6% of whites live in owner-occupied units, only 43.4% of minorities own their homes.[17] The Congressional Black Caucus, in a letter to the Commission in July, expressed its concern that excluding renters from the definition of "viewer" in Section 1.4000 would discriminate against African Americans and other minorities.[18] Moreover, monthly rent, on average, is far less expensive than mortgage

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15 *See* Table No. 1230, "Housing Units -- Summary of Characteristics and Equipment by Tenure and Region: 1993," STATISTICAL ABSTRACT OF THE UNITED STATES 1995 (U.S. Dept. of Commerce, Bureau of the Census) (the "Statistical Abstract") (all Statistical Abstract charts cited herein are attached hereto as Exhibit B). As of 1993, 35% of all housing units in the United States were renter-occupied, and another 4.7% were owner-occupied mobile or trailer homes. *Id.* Since most trailer home residents rent the land on which their home sits, they are renters for the purposes of the FCC's categorization of viewers. *See Yee v. City of Escondido,* 112 S. Ct. 1522, 1526 (1992) ("A mobile home owner typically rents a plot of land . . . from the owner of a mobile home park."). Note that the Statistical Abstract's figures are listed in terms of rental units, not residents, but for the purposes of these Comments an even distribution of residents in various types of housing will be assumed.

16 As discussed in more detail below, cable television providers have a history of entering into anticompetitive exclusive contracts with landlords that prevent other MVPDs from serving MDU residents.

17 Table No. 1225, "Occupied Housing Units -- Tenure, by Race of Householder: 1920-1993," Statistical Abstract. Note that not all viewers living in owner-occupied units are protected by Section 1.4000, as MDU residents may not have access to exclusive use areas suitable for over-the-air reception devices. It is unclear whether a disproportionate number of minorities live in MDUs.

18 Letter from The Honorable Edolphus Towns and other members of the Congressional Black Caucus to The Honorable Reed E. Hundt, dated July 29, 1996, attached hereto as Exhibit C.

payments,[19] leading to the inevitable conclusion that lower-income Americans are disproportionately renters. The Commission cannot satisfy its most fundamental mandate -- "to make available [communications services] . . . to all the people of the United States, without discrimination on the basis of race"[20] -- by promulgating a rule that excludes a large portion of Americans, particularly minorities, from its benefits.

B. Invalidating Lease Restrictions is Not a Taking

The NAA and other commenters argue that invalidating lease restrictions that prevent a tenant from installing an antenna on property he or she already occupies will result in a taking under the Fifth Amendment. Neither *Loretto* nor any other precedent supports such an assertion. Just as the Commission has invalidated private covenants and other private restrictions on the installation of antennas on exclusive use property,[21] it may prohibit similar lease restrictions without implicating the Takings Clause.[22]

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19 In 1993, the average gross monthly rent was $487, less than half the average monthly mortgage payment of $1,015 -- not including the average down payment of approximately $28,663. *Compare* Table No. 1231, "Occupied Housing Units -- Housing Value and Gross Rent, by Region: 1993," Statistical Abstract *with* Table No. 1237, "Recent Home Buyers -- General Characteristics: 1976 to 1994," Statistical Abstract (in 1993, average down payment was 20.2% of median purchase price of $141,900).

20 Section 1 of the Communications Act, 47 U.S.C. § 151.

21 *Order* at ¶¶ 41-48. The comprehensive takings analysis undertaken by the Commission in the *Order* applies with equal force to the prohibition of lease restrictions. DIRECTV briefly discusses some additional authorities below.

22 *Bell Atlantic v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994) (cited in the *Order* at ¶ 65), would affect the constitutional and legal analysis only if an amendment of Section 1.4000 to prohibit lease and other private restrictions is found to be a taking requiring compensation by the government. *Id.* at 1446 (finding FCC's interpretation of statute to confer upon it "an exclusive right of physical occupation [which] would seem necessarily to 'take' property"). As noted below, the amendments proposed herein do not contemplate a "physical occupation" as defined by the Court, and do not implicate the Takings Clause.

Governmental regulation effects a taking if it authorizes a permanent physical occupation of property by a third party or the government. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (establishing that permanent physical occupation by a third party is a "*per se* taking"). If there is no such permanent physical occupation, the court will engage in a factual assessment to determine if the government has engaged in a "regulatory taking," examining the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. *See, e.g., Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978) (the benchmark case for the "multifactor takings inquiry").

Prohibiting lease restrictions that impair a tenant's ability to install an antenna on his or her exclusive use area would not result in a *per se* taking of the landlord's property, as there would be no physical occupation by a third party.[23] First, *Loretto* makes clear that a tenant is not a "third party." The Court's holding in *Loretto* was "very narrow," limited to regulations that "require the landlord to suffer the physical occupation of his building by a *third party*." *Loretto,* 458 U.S. at 440 (emphasis supplied). The court also noted that a *per se* taking occurs when "a *stranger* directly invades and occupies the owner's property." *Id.* (emphasis in original). The New York statute at issue in *Loretto* did not give rights to a tenant, but instead allowed a cable company, a party with which the landlord had no prior relationship, to install its equipment on the landlord's building, resulting in a *per se* taking. *Id.*

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[23] No party has argued that the prohibition of lease restrictions could rise to the level of a regulatory taking under the *Penn Central* analysis. Nor could such an argument be advanced seriously: a tenant's installation of a DBS antenna has at most a *de minimis* economic impact and in no way interferes with the "investment-backed expectations" of a landlord. *See Penn Central,* 438 U.S. at 124.

Second, the installation of a DBS antenna by a tenant in his or her exclusive use area is not a "physical occupation" of the landlord's property as defined by the Court. The government may regulate the use of leased property without implicating the Takings Clause, even if the regulation results in an extension of the renter's occupation of the leased property. *See, e.g., Yee v. City of Escondido,* 112 S. Ct. 1522 (1992); *FCC v. Florida Power Corp.,* 107 S. Ct. 1107, 1111 (1987) (discussed in the *Order* at ¶ 45); *see also Hilton Washington Corp. v. District of Columbia,* 593 F. Supp. 1288 (D.D.C. 1984) (the mere fact that claimant's property "may have been physically invaded cannot be viewed as determinative in a taking case.")

In *Yee,* mobile home park owners argued that the City of Escondido's mobile home rent control ordinance effected a *per se* taking as defined in *Loretto,* because it extended the term of leases without the consent of or additional compensation to the landlord. *Yee,* 112 S. Ct. at 1526. The Court dismissed this argument out of hand, finding that the continued occupation of space by the renters was not a *per se* taking: "Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government." *Id.* at 1528; *see also Florida Power,* 107 S. Ct. at 1111 ("[I]t is the invitation, not the rent that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license.").

While NAA's takings argument may be superficially attractive -- the installation of an antenna often involves a physical attachment to property[24] -- there is no permanent physical occupation by a third party, and therefore no taking. As the Court has made clear, once a

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[24] A DBS antenna could be attached to a balcony in several ways, including placing it upon the balcony with ballast, which would involve no physical attachment.

landlord has voluntarily entered into a lease with a tenant, it has consented to the physical occupation of that space. This applies with particular force here, as there is no extension of the occupation by the renter -- the DBS antenna can (and should) be removed by the renter when he or she leaves the property.[25] There is simply no legal impediment to the prohibition of lease restrictions on the installation of antennas in a renter's exclusive use area.

C. Real Estate Law Does Not Preclude the Commission from Prohibiting Lease Restrictions

Real estate law does not present any obstacles to prohibiting lease restrictions that impair the installation of antennas in exclusive use areas. The Commission asserts in the *Order* that allowing antenna installation on rental properties "raise[s] different considerations [because a] landlord is legally responsible for maintenance and repair and can be liable for failure to perform its duties properly."[26] The Commission did not, however, cite any support for what is, in fact, an incorrect statement of the law. Landlord tort immunity is the rule, and while there are exceptions, they are not applicable to items installed by the tenant on leased property within the tenant's exclusive control.[27]

Indeed, as a matter of real estate law, the Commission's distinction between renters and persons with direct or indirect property interests makes little sense. A lease is a possessory estate interest in property, as is a fee simple and a life estate.[28] As written, Section

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25 Amending Section 1.4000 would not include protecting a renter from liability, if any, for damage caused by the installation of an antenna.

26 *Order* at ¶ 59.

27 *See* RICHARD R. POWELL, PATRICK J. ROHAN, POWELL ON REAL PROPERTY, Vol. 2, ¶ 237, 16B-163 (1996), *citing Medlock v. Van Wagner*, 625 P.2d 207 (Wyo. 1981) (landlord not liable for telephone installer falling on defective steps installed by tenant).

28 *Id.* at § 16.02[3], 16-16 (lease "involves the creation of an estate interest").

1.4000 would enable a person with a life estate, or a more limited term of possession, to install a DBS antenna, while a tenant with a 200-year lease would not have such a privilege. Indeed, there is often little distinction between an owner and a renter. For example, homes are sometimes financed using a lease-back arrangement rather than a mortgage, whereby the bank holds the deed until it is paid a certain percentage of the purchase price.[29] Surely Congress did not intend the Commission to determine which viewers would receive the benefits of Section 207 based upon obscure questions of real estate law. The Commission should therefore abandon its distinction between viewers' land ownership status.

IV. VIEWERS WITHOUT EXCLUSIVE USE AREAS SHOULD HAVE ACCESS TO ANTENNAS

The Commission's task will not be completed by eliminating the distinction between owners and renters. Viewers without exclusive use areas -- primarily residents of MDUs -- have not yet been guaranteed access to over-the-air reception devices by Section 1.4000.[30] While the legal analysis (though not the conclusion) differs from a prohibition on restrictions applied to viewers with exclusive use areas, there is no statutory or policy basis for excluding MDU residents from the protections of Section 207. Today, in nearly all MDUs, residents are unable to choose their MVPD provider; these viewers are often at the mercy of the landlord and the entrenched cable company. Section 207 requires the Commission to eliminate these barriers to viewer choice and MVPD competition.

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29 *Id.* at 3:447, 37-130 (describing absolute deed given as security).

30 These Comments will refer to all viewers without exclusive use areas as MDU residents -- whether condominium owners or renters -- as DIRECTV anticipates that most viewers so situated indeed reside in MDUs. While some MDU residents will be able to receive DBS programming by installing antennas in an exclusive use area, many MDU residents will not have access to a suitable area for installation, given the southern exposure required for reception of DBS signals.

MDU residents access cable television by attaching a cable to their television, which connects to wiring inside the building and a central hook-up outside the building, often pursuant to an exclusive contract that prevents the landlord from allowing another MVPD to provide service to the MDU residents. Other MVPDs, such as DIRECTV, provide services to MDU residents via a two-part delivery system, consisting of the satellite antenna that receives the signal, and the wiring that brings that signal from the antenna, through the building, to the viewer's integrated receiver/decoder ("IRD") (also referred to as a "set-top box").[31] In order to reach these viewers, MVPD providers must have the appropriate antenna on site, and access to the inside wiring to deliver that signal to the individual units.

In order to implement Section 207, the Commission should guarantee that MDU residents have access to at least two MVPD services. First, landlords should be required to provide residents access to at least two competitive MVPDs. If necessary, landlords will need to install and maintain antennas on their property. (The Community Associations Institute ("Community") submitted a similar proposal in Comments earlier in this proceeding, as noted in the *Order*.[32]) Second, the Commission should prohibit exclusive contracts between landlords[33] and cable television companies, which have exercised their market power in the MVPD services market to obtain such agreements. Third, the Commission should, in its pending proceeding

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31 *See* Declaration of Lawrence N. Chapman, DIRECTV's Senior Vice President of Special Markets and Distribution, attached hereto as Exhibit D ("Chapman Dec."). The Chapman Declaration describes DIRECTV's direct-to-home MDU installation and maintenance system.

32 *See Order* at ¶ 49.

33 For the purposes of this section, "landlords" will refer to all entities owning and controlling MDUs, including community associations, condominium associations and commercial and individual landlords.

regarding inside wiring, allow MVPDs access to existing conduit and wiring inside MDU buildings on a non-interference basis.[34]

A. Section 207 Does Not Permit the Commission to Ignore MDU Residents

As discussed above, Congress provided the Commission with a broad mandate. Section 207's language is direct, without any limitations or qualifications: the Commission is required to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive over-the-air video programming services through devices designed for over-the-air reception." The statute makes no distinction between residents of single family homes or MDUs, nor does it limit the type of restrictions to be prohibited.

Congress's policy goals were broad, as well. The Telecommunications Act was enacted to provide all Americans with access to over-the-air video programming, and to promote competition to entrenched cable television providers.[35] These goals cannot be accomplished if MDU residents -- a group comprising more than 25% of the population[36] -- are not provided the benefits of the Commission's regulation.

MDU residents are perhaps the viewers most in need of the kind of protections envisioned by Congress. The MDU resident -- the "viewer" -- is typically unable to choose his or her MVPD provider. In many cases, the landlord has entered into an exclusive contract with the

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34 *See Telecommunications Services Inside Wiring and Customer Premises Equipment,* CS Docket 95-184 ("Inside Wiring Proceeding").

35 *See, e.g.,* Telecommunications Act of 1996, Pub. L. No. 104-104, § 302 (allowing telephone companies to provide cable television service).

36 *See* Table No. 1230, "Housing Units -- Summary of Characteristics and Equipment by Tenure and Region: 1993," Statistical Abstract (in 1993, MDUs accounted for 24,776,000 of the total 94,724,000 housing units in the U.S., or 26.1% of all housing units).

local cable television franchisee, which prohibits the landlord's tenants from receiving video programming from any other MVPD provider.[37] Such exclusive arrangements defeat the policy goals of Section 207, denying the *viewer* the right to choose between MVPD providers, and preventing MVPD providers from competing in the MDU market.

B. The Fifth Amendment is Not Implicated by Requiring Landlords to Provide Access to Antennas

As discussed above, a regulation results in a *per se* taking only if it requires a property owner to suffer a permanent physical occupation by a third party. While the Commission should be guided by *Loretto* and its progeny in fashioning a rule that guarantees access to MDU residents, these cases do not in any sense preclude the adoption of a rule requiring landlords to provide access to antennas. As long as the landlord maintains control over the installation and maintenance of the antenna, the FCC's rule will be a constitutional regulation of the landlord-tenant relationship, not at all implicating the Takings Clause.

NAA and other opponents of the extension of Section 1.4000 cite *Loretto* as a talisman that prevents the government from providing MDU residents with access a choice of MVPD services. Neither the Court's holding nor its reasoning leads to such a conclusion. The *Loretto* Court struck down New York's cable television access statute solely because it gave a third party -- the cable company -- the right to occupy the landlord's property permanently. *Loretto,* 458 U.S. at 440. Accordingly, the NAA argues that the Commission may not amend Section 1.4000 to require a landlord to allow an MVPD distributor to place an antenna on its building.

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[37] *See* Comments filed in Inside Wiring Proceeding, including Comments of GTE, Liberty Cable Company, Inc., Wireless Cable Association International, Inc., and Reply Comments of DIRECTV.

However, the Court in *Loretto* was careful to note that if New York had required the landlord to provide cable television service at the tenant's request, "the statute might present a different question . . . since the landlord would own the installation." *Id.* at n.19. The Court went on to explain that in that case the landlord would have "full authority over the installation," including the right to minimize its aesthetic impact and other effects and the ability to use his property on and around the installation without involving a third party. *Id.* The Court also made clear in its decision that it was not at all altering the government's right to regulate the landlord-tenant relationship, even if that regulation required the landlord to install equipment that would physically occupy space in the building. *Id.* The Court explicitly approved, for example, regulations that would require landlords to provide utility connections, mailboxes, smoke detectors and fire extinguishers in common areas. *Id.* The Court also reaffirmed its precedent upholding a regulation requiring a landlord to install a fire sprinkler system -- equipment far more invasive than a DBS antenna. *Id.*

C. The Commission Should Require Landlords to Provide Access to Antennas

As Congress recognized when it adopted Section 207, MVPD providers can compete with cable operators only if viewers have access to antennas. The MDU market, because MDU residents often do not have exclusive use areas suitable for the installation of antennas, is particularly susceptible to the market power of cable television. The Commission will be able to promote competition in this significant market only if it requires landlords to make available to residents at least two MVPD services -- which means providing access to antennas.

First, the Commission should require landlords to provide residents access to at least two MVPD services, which may require the installation of one or more MVPD antennas.[38] *Loretto* and its progeny teach that the government may not authorize a third party permanently to occupy another's property without providing just compensation under the Fifth Amendment. Accordingly, the Commission should require the landlord itself to install the requisite antenna(s) on its property.[39] (In the case of DIRECTV, only one antenna is required to serve an entire building.)[40] By owning the antenna, the landlord would have full control over its placement, subject only to technical reception requirements; each resident would have access to at least two MVPD services.[41]

Second, MVPDs must have access to the wiring and conduits inside MDU buildings in order to deliver the programming from the antenna to the viewer. In the pending Inside Wiring Proceeding, DIRECTV has urged the Commission to require MDUs and cable

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38 The number of antennas required will depend upon the services offered. Some MVPDs, such as DIRECTV, can provide service to a MDU with only one antenna. Cable television, on the other hand does not use antennas for MDUs.

39 Community's proposal is nearly identical: "the community association could purchase and install one or more direct broadcast satellite antennas which would receive service from all satellite service providers requested by owners or residents. Each individual resident would then be able to select and subscriber to the satellite service of his choice." Community DBS Comments at 18-19.

40 Chapman Dec. at ¶ 2.

41 As discussed above, landlords should not be able to restrict the installation of antennas in exclusive use areas, regardless of the services they provide via common antennas. MDU residents with exclusive use areas would be able to access as many MVPDs as they wish to receive via antennas installed in those areas. From a practical perspective, however, a tenant who may obtain service from an MVPD via a shared rooftop antenna is likely to do so.

companies to provide access to the wiring and/or conduit in the building.[42] As discussed in DIRECTV's Comments, in some cases several MVPDs can share the same wire without signal degradation, and in all cases MVPD services can be provided via existing conduit, requiring no additional construction and having no aesthetic impact upon the building. The Inside Wiring Proceeding must be resolved expeditiously to allow MVPDs to provide service to MDU residents.

Third, the Commission should also prohibit exclusive contracts between landlords and cable television operators that preclude the landlords from providing other MVPD services to their residents.[43] Cable television enjoys a monopoly position in most areas, able to exercise market power to thwart competition from other MVPD providers.[44] Cable operators have exercised this market power to keep other MVPDs from competing in the MDU market. In DIRECTV's experience, most landlords agreed to grant cable television operators exclusivity because they had no other MVPD with which to bargain.[45]

This use of exclusive contracts by incumbent cable television operators violates Section 628 of the Communications Act, adopted in 1993, which prohibits any MVPD from

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42 Inside Wiring Proceeding, Comments of DIRECTV, filed March 18, 1996; Reply Comments of DIRECTV, filed April 17, 1996.

43 The Commission should not preclude exclusive contracts between other MVPDs and landlords that are reached in a competitive environment where the MVPD has no market power.

44 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, CS Docket No. 95-61 (December 11, 1995), at ¶¶ 194-209 ("markets for the distribution of video programming are not yet competitive") (*"Second Annual Report on MVPD Competition"*).

45 Chapman Dec. at ¶ 4. As the Commission has found, this is not the only type of anticompetitive behavior used by cable system operators to dominate the MDU market. *See Second Annual Report on MVPD Competition* at ¶¶ 208-209 (describing use of strategic non-uniform pricing by cable operators to keep alternative MVPDs from competing in MDU market).

engaging in "unfair methods of competition" that prevent another MVPD from providing programming to subscribers or customers.[46] While Section 628 was adopted to address anticompetitive practices in the programming market, such as exclusive contracts between cable operators and vertically integrated satellite programming vendors, Congress authorized the Commission "to adopt additional rules to accomplish the program access statutory objectives should additional types of conduct emerge as barriers to competition."[47] The cable operators' use of market power to obtain exclusive contracts with landlords is precisely the type of barrier to competition Congress and the Commission have consistently sought to eliminate.

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46 Communications Act Section 628(b), 47 U.S.C. § 548(b) ("It shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing programming to subscribers or customers."); *see also* 47 C.F.R. § 76.1001 (similar language).

47 *See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* CS Docket 96-46, FCC 96-344 (Third Report and Order and Second Order on Reconsideration), August 8, 1996, at ¶¶ 169-170.

V. CONCLUSION

For the reasons stated above, the Commission should amend Section 1.4000 of its rules to eliminate the distinction between renters and landowners. The Commission should also require landlords to provide MDU residents with access to antennas, and preclude all exclusive contracts between MVPD providers and landlords as anticompetitive.

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